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Supreme Court, U.S.
FILED

No. 02 149 JUN 24 2002

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

SPANISH COVE SANITATION, INC. PETITIONER

v.

LOUISVILLE AND JEFFERSON
COUNTY METROPOLITAN
SEWER DISTRICT RESPONDENT

On Petition for a Writ of Certiorari to the
Kentucky Supreme Court

PETITION FOR WRIT OF CERTIORARI

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3589

QUESTION PRESENTED FOR REVIEW

I. WHETHER THE KENTUCKY COURTS CAN PROPERLY DISMISS, WITH PREJUDICE, FEDERAL AND STATE CONSTITUTIONAL CLAIMS FOR TAKING OF PROPERTY, AFTER FINDING THAT THOSE CLAIMS ARE NOT RIPE.

STATEMENT PURSUANT TO RULE 29.6

Petitioner Spanish Cove Sanitation, Inc. state that it has no corporate parents, and that no publicly held company owns any of Spanish Cove Sanitation's Stock.

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JURISDICTION OF THIS COURT

The judgment of the Kentucky Supreme Court was entered on April 25, 2002. (App-2) This Court has jurisdiction to review the judgment of the Supreme Court of Kentucky pursuant to 28 U.S.C. § 1257.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution:

> Criminal actions--Provisions concerning--Due process of law and just compensation clauses.
>
> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the United States Constitution:

> Sec. 1. [Citizens of the United States.]
> All persons born or naturalized in the

> United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. USCS Const. Amend. 14 (2002).

STATEMENT OF THE CASE

The Petitioner, Spanish Cove Sanitation, Inc. (hereinafter, "Spanish Cove") is the owner of a waste water treatment facility, including grounds, equipment, pipe systems and appurtenances in southern Jefferson County, Kentucky. The Respondent, Louisville and Jefferson County Metropolitan Sewer District (hereinafter, "MSD"), is a public body corporate with the right to maintain, operate and make extensions and improvements to the comprehensive sewer and drainage system in the district, and is granted the power of eminent domain pursuant to KRS 76.110, et seq., the Eminent Domain Act of Kentucky.

At the center of litigation is the construction and operation of a sewer project known as Fern Creek Interceptor Number Five, which extended from its uppermost point at the MSD-owned Kellwood waste water treatment facility and terminated at its lowermost point, the Morris-Foreman Sewage Treatment Facility. Along this main line, the "A" line, there was a planned, and now constructed, "D" line, which extended from the "A" line trunk outward to the main feed line of Spanish Cove pipe system. The "D" line flushes all of Spanish Cove's past customers into the Morris-Foreman system and, consequently, renders the Spanish Cove plant valueless and leaving Spanish Cove with nothing but liability for cleanup and closure costs. The attachment of the "D" line to the Spanish Cove system in this manner

has the effect of taking, without compensation, every pipe within the system.

On October 8, 1997, Spanish Cove brought suit in Jefferson Circuit Court under the Fifth and Fourteenth Amendments to the United States Constitutions; Sections 13 and 242 of the Kentucky Constitution, and, KRS 65.115, each such claim being premised upon the theories of an unjust "taking" of private property and reverse/inverse condemnation. MSD challenged this action by motion to dismiss or for summary judgment filed on November 10, 1997, claiming that the action was not ripe, among other arguments. After briefing and oral arguments, the trial court entered its order on March 5, 1998, dismissing the Petitioner's claims, including its federal constitutional claims, with prejudice. (App. 25)

Thereafter, Petitioner perfected an appeal, which was heard by a panel of three judges from the Court of Appeals, after which they referred the matter for an en banc review, which ended in a deadlocked decision. That court requested the Kentucky Supreme Court to accept the matter on Transfer, which was subsequently denied. The matter was ultimately resubmitted to the original Court of Appeals panel, which affirmed the trial court. (App. 17) Spanish Cove timely sought discretionary review of this matter before the Kentucky Supreme Court, which was granted.

The Kentucky Supreme Court affirmed the decision of the trial court and the opinion of the Court of Appeals. In so doing, the Kentucky Supreme Court held that the issue was not ripe, and that the trial court did not abuse its discretion by so holding. However, despite this holding, the Kentucky Supreme Court went on to the merits of the issues, finding that the Petitioner's state and, more importantly, federal, constitutional claims were properly dismissed.

REASONS FOR GRANTING THE WRIT

I. THE KENTUCKY SUPREME COURT HAS NO SUBJECT MATTER JURISDICTION TO DISMISS FEDERAL CONSTITUTIONAL CLAIMS WITH PREJUDICE, ONCE IT MAKES A DETERMINATION THAT THE ISSUES ARE NOT RIPE.

The Kentucky Supreme Court made an initial finding that the Petitioner's "taking" claims, premised on the Fifth and Fourteenth Amendments to the United States Constitution, were not ripe, yet it proceeded to find that the dismissal of said claims, with prejudice, was appropriate. This is clearly in violation of longstanding state and federal caselaw, which has long held that courts cannot issue opinions on matters that are not ripe, and therefore cannot issue advisory opinions, much less binding judgements dismissing claims with prejudice.

This holding of the Kentucky Supreme Court is clearly in conflict with its own precedents, as well as that of this Court, Kentucky having adopted the jurisprudence of this Honorable Court in relation to this issue. In Associated Indus v. Commonwealth, Ky., 912 S.W.2d 947 (1996) that Court held:

> "[W]ithin the context of federal law, it is understood that Article III of the United States Constitution permits only adjudication of actual cases and controversies. Flast v. Cohen, 392 U.S. 83, 88 S. Ct. 1942, 20 L. Ed. 2d 947 (1968). An actual controversy requires that a controversy be ripe for adjudication. Pacific Gas & Elec. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 103 S. Ct. 1713, 75 L. Ed. 2d 752 (1983). Further, the ripeness doctrine requires the judiciary to refrain from giving advisory opinions on hypothetical issues. United States v. Fruehauf, 365 U.S. 146, 81 S. Ct.

547, 5 L. Ed. 2d 476 (1961).

Id. at 951.

This complaint was filed in October of 1997. Before any discovery was undertaken, or any facts sufficiently developed for presentation of the merits to the trial court, the Respondent filed its motion to dismiss on November 10, 1997, on the basis that this matter was not ripe. With no record before it to make a determination on the merits, the trial court dismissed the action. Thereafter, the court of appeals and supreme court of Kentucky found the matter was not ripe, yet both upheld the dismissal of the action with prejudice, thus precluding Petitioner from ever presenting its Fifth and Fourteenth Amendment claims for proper and thoughtful adjudication. Once the Kentucky Supreme Court, as well as the courts below, made the determination that the matter was not ripe, it was without jurisdiction to enter judgment dismissing the claims with prejudice. Respectfully, writ of certiorari should issue to review the judgment herein.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully Submitted,

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Date: July 24, 2002

APPENDIX

SPANISH COVE SANITATION, INC., APPELLANT
v.
LOUISVILLE-JEFFERSON COUNTY METROPOLITAN SEWER DISTRICT, APPELLEES

2000-SC-000496-DG

SUPREME COURT OF KENTUCKY

April 25, 2002, Rendered

OPINION OF THE COURT BY JUSTICE GRAVES
AFFIRMING

In 1993, the Court of Appeals declared *KRS 65.115* n1, a statute which was enacted to provide compensation for taking sewage treatment utility property, unconstitutional as special legislation. Consequently, the Jefferson Circuit Court in this case correctly granted a motion to dismiss a subsequent complaint seeking recovery based on the same statute. Once an appellate court has declared a statute unconstitutional in its entirety, the statute cannot thereafter provide any rights or powers under Kentucky law.

----------Footnotes----------

n1 *KRS 65.115(1)* Compensation for sewage treatment utility property --Eminent domain -- Surcharge to customers: "The provisions of any other law, rule, or regulation notwithstanding, if any city, county, public body corporate or politic or special district or subdistrict, other than an urban county, furnishes, or proposes to furnish, sewage treatment utility services to customers of another sewage treatment utility by means of all or any part of the installations owned or paid for by such other sewage treatment utility, then such city, county, public body, district or subdistrict taking over or proposing to

take over the customers, shall pay just compensation for such installations prior to the time the customers are taken over. If an agreement for compensation is not reached, then just compensation for the installations shall be payable by said city, county, public body, district or subdistrict after condemnation as provided for in the Eminent Domain Act of Kentucky."

----------End Footnotes----------

Appellant, Spanish Cove Sanitation, owns a waste water treatment facility that is composed of grounds, equipment and pipe systems providing waste water and sewage treatment to residential customers in the Fern Creek area of Jefferson County. Appellee, Louisville-Jefferson County Metropolitan Sewer District, is a municipal corporation with the power to acquire land by eminent domain proceedings pursuant to *KRS 76.110*. Appellee, as part of its project to expand services into the Fern Creek area, planned to tie into the pipe system that served Appellant's customers. This would render Appellant's facility valueless. Appellee did not plan to pay Appellant, nor did it file an eminent domain action.

Appellant filed this action in the Jefferson Circuit Court asserting federal claims under the 5th and 14th Amendments of the United States Constitution and state claims under Sections 13 and 242 of the Kentucky Constitution relating to the taking of private property for public use without just compensation. Appellant also made a claim pursuant to *KRS 65.115* which requires a public corporation that maintains a sewer service to compensate for taking the customers of another sewer service. Appellee filed a motion to dismiss the action for ripeness, as, at that point, Appellee had not yet tied into Appellant's lines. Appellee also argued that the claim under *KRS 65.115* should be dismissed because the Court of Appeals had found the statute unconstitutional in *Monticello Co. v. Commonwealth of Kentucky, Natural Resources and Environmental Protection Cabinet, Ky. App., 864 S.W.2d 921 (1993).*

The trial court granted the motion to dismiss, stating that the record reflected that the taken property had, in fact, been paid for. The Court of Appeals thereafter stated in an unpublished opinion that the ruling below indicated the trial court's confusion between this case and a previous action between the same parties that had been resolved in another division of Jefferson Circuit Court.

The Court of Appeals' opinion focused on *KRS 65.115*. In Monticello, the Court of Appeals deemed the statute special legislation n2, because it exempted urban county government from the provisions of the statute, an exemption which only applied to the Lexington-Fayette Urban County Government. In considering the instant case, the Court of Appeals panel opined that *KRS 65.115* could be saved by severing out the unconstitutional language "other than an urban county" and leaving the rest of the statute' intact. Thus, in the panel's opinion the Monticello decision went too far and Appellant, in fact, had a cause of action. The panel referred the case for en banc consideration of this proposition and the entire Court split 7-7 on the question.

----------Footnotes----------

n2 Ky. Const. § 59 provides that "the General Assembly shall not pass local or special acts concerning any of the following subjects, or for any of the following purposes. . .: Twenty-ninth: In all other cases where a general law 'can be made applicable, no special law shall be enacted." Section 60 provides in part that "the General Assembly shall not indirectly enact any special or local act .... by exempting from the operation of a general act any city, town, district, or county.

----------End Footnotes----------

The Court of Appeals thereafter recommended transfer to this Court. We denied transfer because the taking had not actually occurred at the time the suit was filed and a judgment dismissing the claim was entered.

On reconsideration by the en banc panel, the Court of Appeals held that the trial court had dismissed the case "with prejudice" and such a dismissal would operate to foreclose Appellant from presenting the case when the taking actually did occur. n3 Further, the panel pointed to a notation on the trial court's ruling concerning *KRS 65.115*:

> An appeal should be taken in this action in regard to the interpretation of *KRS 446.090* versus the interpretation of *KRS 65.115*. The issue of a lack of constitutional standing and the issue of special legislation should be decided by the appellate court.

----------Footnotes----------

n3 The parties have indicated this has since happened.

----------End Footnotes----------

KRS 446.090 n4 deals with severability of unconstitutional provisions from the balance of a statute.

----------Footnotes----------

n4 446.090. Severability. It shall be considered that it is the intent of the General Assembly, in enacting any statute, that if any part of the statute be held unconstitutional the remaining parts shall remain in force, unless the statute provides otherwise, or unless the remaining parts are so essentially and inseparably connected with and dependent upon the unconstitutional part that it is apparent that the General Assembly would not have enacted the remaining parts without the unconstitutional part, or unless the remaining parts, standing alone, are incomplete and incapable of being

executed in accordance with the intent of the General Assembly.

----------End Footnotes----------

Turning to the *KRS 65.115* issue, the panel on reconsideration concluded it was bound by *Monticello, supra,* because a majority of the Court of Appeals had declined to overrule it. The panel then turned to a decision of the United States Court of Appeals for the Sixth Circuit for guidance, *Calvert Investments, Inc. v. Louisville-Jefferson County Metropolitan Sewer District, 847 F.2d 304 (6th Cir. 1988),* which held that the owner of the treatment facility had bare legal title to the pipes. However, the customers had the right of free usage of those pipes. Servicing those customers was deemed to be a mere expectancy and not a protected property interest. *Id. at 308.* Thus, the Court of Appeals panel concluded in this case that Appellant did not have an avenue by which to seek compensation. We granted discretionary review to address the concerns raised by Monticello and we now affirm the Court of Appeals' decision.

At the outset, we should note that the trial court did not abuse its discretion in determining that the issue was not ripe. Under Kentucky law, before a plaintiff can make a claim of inverse condemnation, there must be an actual taking. *Holloway Const. Co. v. Smith, Ky., 683 S.W.2d 248, 249 (1984).* In *Associated Industries of Kentucky v. Commonwealth, Ky., 912 S.W.2d 947 (1995),* we held that Kentucky courts cannot grant advisory opinions or rule on hypothetical questions, but rather must rule on real disputes. At the time this action was filed, nothing had even arguably been taken.

Notwithstanding, Appellant's claim would still fail based on the *KRS 65.115* argument. The Court of Appeals, under *KRS 446.090,* may have theoretically been able to sever the unconstitutional portion of *KRS 65.115,* leaving the remainder intact. However, the Court of Appeals held the statute unconstitutional in its entirety in Monticello, a fact neither this Court nor the General Assembly has

changed in eight years. It is not now appropriate for this Court to revisit the severability of a statute previously held unconstitutional.

What Appellant fails to recognize in arguing that the unconstitutional portions of *KRS 65.115* are severable from the remainder of the statute is that *KRS 65.115* no longer exists. For 85 years, it has been the law in Kentucky that any statute passed in contravention of the Constitution is void ab initio, and any action taken thereunder is a nullity. *City of Henderson v. Lieber's Ex'r, 175 Ky. 15, 192 SW. 830 (1917).* The effect of the Court of Appeals declaring *KRS 65.115* unconstitutional is to render it a nullity. It is impossible to now parse out the unconstitutional pieces of something that does not exist.

We agree with the Court of Appeals that, in the absence of *KRS 65.115,* the *Calvert Investments, Inc., supra,* rationale is applicable in this case. Appellant has no protected property interest in providing sewage treatment services to the Fern Creek customers; it has but a mere expectancy. Therefore, we affirm the Court of Appeals in its opinion that the trial court properly granted summary judgment in favor of the Louisville-Jefferson County Metropolitan Sewer district.

Lambert, C.J., Cooper, Graves, Johnstone, Stumbo, and Wintersheimer, J.J., concur. Keller, J., dissents in a separate opinion.

DISSENTING OPINION BY JUSTICE KELLER

For several reasons, I respectfully dissent. I would reconsider the constitutionality of *KRS 65.115* in light of *KRS 446.090,* overrule Monticello Co. v. Commonwealth of Kentucky. Natural Resources and Environmental Protection Cabinet, n1 reverse the decision of the Court of Appeals in this case, and remand this action to the trial court for it to resolve the merits of Appellant's *KRS 65.115* claim. Although I agree with the majority of this Court and with the Court of Appeals that the trial court correctly dismissed Appellant's constitutional, inverse (or reverse) n2 condemnation claim because that claim was

not yet ripe, I believe the trial court erred when it dismissed that claim "with prejudice," and I would reverse the Court of Appeals and remand that claim to the trial court with instructions for it to dismiss the claim *without* prejudice.

----------Footnotes----------

n1 *Ky.App., 864 S.W.2d 921 (1993)* (hereinafter "Monticello").

n2 See *Jones v. Commonwealth, Transp. Cabinet, Dept. of Highways, Ky.App., 875 S.W.2d 892, 893 (1993)* ("Ordinarily, the law of eminent domain requires that prior to such a 'taking' occurring that land be condemned. Appellant's however, brought this action as a 'reverse condemnation' action. A 'reverse condemnation' action differs from an ordinary condemnation action in that the land has already been taken by the government."); *Commonwealth. Dept. of Highways v. Davidson, Ky., 383 S.W.2d 346 (1964).*

----------End Footnotes----------

First, I observe that the majority proceeds from a mistaken belief that " *KRS 65.115* no longer exists." n3 This belief is simply not factually correct. The General Assembly enacted *KRS 65.115*, n4 and only the legislature has the power to repeal that statute and remove it as part of the Commonwealth's statutory law. n5 As an inspection of Volume Four of the Official Edition of the Kentucky Revised Statutes will reveal, the General Assembly has not repealed *KRS 65.115*, and that statute remains an enacted law in this Commonwealth. Although I recognize that, in Monticello, the Court of Appeals declared *KRS 65.115* unconstitutional, I cannot agree with the majority's assertion that "once an appellate court has declared a statute unconstitutional in its entirety, the statute cannot thereafter provide any rights or powers under Kentucky law," n6 nor can I endorse the majority's conclusion that the Monticello decision wiped *KRS 65.115* from the books. The Monticello decision held that *KRS*

65.115's unconstitutionality rendered that provision unenforceable, but that holding does not prevent this Court from revisiting the statute's unconstitutionality.

----------Footnotes----------

n3 Majority Opinion S.W.3d , (200_) (Slip Op. at 5).

n4 1986 Ky. Acts, ch. 445, § 1, effective July 15, 1986.

n5 KY. CONST. § § 27 & 28.

n6 Majority Opinion, supra note 3 at (Slip Op. at 2).

----------End Footnotes----------

While I have concerns about the practical consequences of the majority's conclusion, n7 my most significant concern is that the majority cites no authority to support its contention that a prior appellate determination finding a statute unconstitutional prevents the judiciary from reconsidering that prior determination unless and until the General Assembly chooses to reenact the legislation. And, in fact, I would observe that prior opinions addressing the constitutionality of certain statute of limitations provisions n8 provide ample evidence that the judiciary has the power to reconsider a previous holding declaring a statute unconstitutional. In 1973, in Saylor v. Hall, n9 our predecessor held that these limitations provisions violated the Kentucky Constitution and accordingly declared the statute unconstitutional. Nine (9) years later, in Carney v. Moody, n10 this Court revisited the issue, concluded that the provisions were not constitutionally infirm, and applied them to the pending case. Yet, another four (4) years later, this Court again revisited the issue in Tabler v. Wallace n11 and once again declared the provisions unconstitutional, although on different constitutional grounds:

> Carney v. Moody reached an opposite result from Saylor v. Hall while conceding

> that there was no "factual distinction" and without overruling it. We need not write Chapter Three to Saylor v. Hall and Carney v. Moody. The inquiry has shifted from whether the statute is arbitrary and discriminatory, to constitutional issues not discussed in those opinions, equal protection and special legislation. n12

Through all of this litigation, however, the statutes remained on the books until they were amended by subsequent legislation. n13

----------Footnotes----------

n7 For instance, if a circuit court, sitting as an appellate court, see KY. CONST. § 112(5); CR 72, *et seq*; RCr 12.02, holds a legislative enactment unconstitutional and the Court of Appeals either denies discretionary review or no party seeks discretionary review, the majority's logic would dictate that the statute is void and unenforceable throughout the Commonwealth despite the fact that almost no one in the state would know about the circuit court's unpublished holding.

n8 *KRS 413.120(14)* [now *KRS 413.120(13)*] and *KRS 413.135(1)*; See 1964 Ky. Acts, ch. 124, § 1; 1966 Ky. Acts. ch. 246. These provisions, described as "no action" statutes, provided home builders and those persons engaged in the "design, planning, supervision, inspection or construction of any improvement to real property" with immunity from suit for damages or injuries caused by any deficiency after the expiration of five (5) years from occupancy and/or substantial completion of improvements.

n9 *Ky., 497 S.W.2d 218, 225 (1973)* ("[The provisions] cannot be applied to bar the plaintiffs' claims in this action. Such application is constitutionally impermissible in this state because it would violate the spirit and

language of Sections 14, 54, and 241 of the Constitution of Kentucky . . . .").

n10 *Ky., 646 S.W.2d 40 (1982)* ("The statutes do not violate the constitutional provisions.").

n11 *Ky., 704 S.W.2d 179 (1985), cert. denied, 479 U.S. 822, 107 S.Ct. 89, 93 L. Ed. 2d 41 (1986).*

n12 *Id. at 187.*

n13 1986 Ky. Acts, ch. 479, § 1, effective July 15, 1986; *repealed and reenacted,* 1990 Ky. Acts, ch. 425, § 4, effective July 13, 1990.

----------End Footnotes----------

Accordingly, *KRS 65.115,* like the statute of limitations provisions addressed in the opinions discussed above, was not erased from the books by the Court of Appeals' decision in Monticello but remains part of our body of statutory law, albeit unenforceable unless resuscitated by a decision of this Court. Therefore, it is now appropriate for this Court to review - for the first time - issues concerning the constitutionality of *KRS 65.115.* n14

----------Footnotes----------

n14 Under the majority's rationale that it is not appropriate for this Court to revisit a statute previously held unconstitutional by a final decision of an appellate court, we are in effect adopting a rule that this Court is bound to follow the precedents of the Court of Appeals. While the converse is certainly true; "the Court of Appeals is bound by and shall follow applicable precedents established in the opinions of the Supreme Court[.]" SCR 1.030(8)(a), I can find no authority supporting the position adopted today.

----------End Footnotes----------

I would overrule Monticello because the Court of Appeals failed to consider *KRS 446.090,* which requires us

to uphold the constitutionality of a legislative enactment, if possible, by severing the unconstitutional portions while leaving the remainder in force. Although the Court of Appeals panel that decided this case below recognized the Monticello court's oversight, the panel's "hands were tied" by the previous, equally-divided en banc decision declining to overrule Monticello. Nevertheless, the Court of Appeals opinion in this case addresses Monticello's error. Because the panel's analysis adequately expresses my views, I see no reason to "reinvent the wheel" in this dissenting opinion. Thus', I will adopt the panel's analysis:

> Spanish Cove urges us to sever the unconstitutional portion of *KRS 65.115* from the remainder of the statute and uphold its constitutionality. Because Monticello declared the entire statute unconstitutional as special legislation, we may not do so without overruling Monticello. This panel would overrule Monticello and revive *KRS 65.115* except for the portion of it that was unconstitutional as special legislation. However, a majority of the entire Court of Appeals, after considering this issue en banc, refused to do so. We are therefore bound by Monticello which declares the entire statute unconstitutional The basis of this court's decision in Monticello was that the statute was unconstitutional as special legislation because it excluded urban county governments from its scope. Although *KRS 65.115(2)* grants the power of eminent domain with respect to sewage treatment plants, facilities, and installations owned by sewage treatment facilities to any city, county, public body corporate or politic or special district or subdistrict, *KRS 65.115(1)* exempts urban counties from paying just compensation for the use of privately-owned installations prior to the

time the customers are taken over as is required of all other public bodies. As the Monticello court held, this is special legislation in violation of Sections 59 and 60 of the Kentucky Constitution. Having properly determined that *KRS 65.115* contained an unconstitutional portion which constituted special legislation, the Monticello court did not take the next step and determine whether the unconstitutional portion of the statute could be severed, thereby leaving the remainder of the statute intact. In the opinion of this panel, *KRS 446.090* was clearly applicable.

KRS 446.090 states: It shall be considered that it is the intent of the general assembly, in enacting any statute, that if any part of the statute be held unconstitutional the remaining parts shall remain in force, unless the statute provides otherwise, or unless the remaining parts are so essentially and inseparably connected with and dependent upon the unconstitutional part that it is apparent that the general assembly would not have enacted the remaining parts without the unconstitutional part, or unless the remaining parts, standing alone, are incomplete and incapable of being executed in accordance with the intent of the general assembly.

As *KRS 446.090* applies to *KRS 65.115*, we first note that the latter statute does not provide that the entire statute should be determined to be unconstitutional if any portion of it is so declared. Next, we note that the five-word phrase "other than an urban county" is neither essential nor inseparably connected and dependent upon

> the constitutional portion such that the general assembly would not have enacted the statute without it. This very rationale was applied by this court to a statute regarding horse racing in *Tn-City Turf Club, Inc. v. Public Protection & Regulation Cabinet, Ky. App., 806 S.W.2d 394, 397 (1991)*. This panel believes that this court's decision in Monticello was too broad in declaring *KRS 65.115* unconstitutional in its entirety and that the statute should have been held to remain in force after severing the unconstitutional portion concerning urban county governments under the tenets of the Tn-City case and *KRS 446.090*. (footnotes omitted)

For the reasons well-articulated by the Court of Appeals, I would overrule Monticello and revive the constitutional parts of *KRS 65.115*. Although the trial court's judgment dismissing Appellant's *KRS 65.115* claim may have been correct under the Monticello holding, I believe that Monticello incorrectly declared *KRS 65.115* unconstitutional in its entirety, and I would thus remand Appellant's statutory claim to the trial court for resolution of its merits.

As to Appellant's other claim - inverse (or reverse) condemnation premised on protections contained within the state and federal constitutions - I agree with the majority that the trial court properly dismissed Appellant's action because such claims will not ripen until an actual taking has occurred. n15 In my opinion, however, the trial court erred when it dismissed this claim "with prejudice" - thereby precluding Appellant from later asserting a reverse condemnation claim after an actual taking - and the majority offers an advisory opinion when it affirms the view of the Court of Appeals that, even if the claim was ripe, Appellant would have no recognizable property interest to assert. In my opinion, the record at this stage of the proceedings does not permit

the inference that the factual issues in this case - particularly those relating to the Appellant's ownership interest in the sewer pipe system that served Appellant's customers - are "on all fours" with Calvert Instruments, Inc. v. Louisville Jefferson County Metropolitan Sewer District. n16 This deficiency leaves this Court facing the same quandary as the Court in Louisville and Jefferson County Metropolitan Sewer Dist. v. Tarrytowne Sanitation Co.: n17

> The big question is, what is being taken? This will generally be determined by the circumstances in each particular case. There are several relevant questions. Is the acquisition merely the dedicated public easements containing sewer lines which have been fully paid for by the abutting and using property owners? Is the acquisition an established utility and profitable business? Or, is it something in between? Who owns the easements, if anyone? Who will provide the access to the existing easements, if access is necessary? We do not have all of the answers or even all of the questions. n18

Accordingly, I believe factual issues remain which make summary judgment on Appellant's inverse (or reverse) condemnation claim improper in the case's current posture.

----------Footnotes----------

n15 *Jones v. Commonwealth. Transp. Cabinet, Dept. of Highways, supra* note 2, *875 S.W.2d at 893* ("From the very nature of a 'reverse condemnation' action there can be no breach of the implied promise to pay until first there has been a compensable 'taking.'").

n16 *847 F.2d 304 (6th Cir. 1988).*

n17 *Ky.App., 818 S.W.2d 267 (1991).*

n18 *Id. at 268* (emphasis added).

----------End Footnotes----------

For the above reasons, I would reverse the decision of the Court of Appeals and: remand this action to the trial court for it to: (1) resolve the merits of Appellant's *KRS 65.115* claim; and (2) dismiss Appellant's inverse (or reverse) condemnation claim *without* prejudice.

RENDERED: MAY 12, 2000; 10:00 a.m
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 1998-CA-000770--MR

SPANISH COVE SANITATION, INC.
APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
v.
HONORABLE KENNETH G. COREY, JUDGE

ACTION NO. 97-CI-04911

LOUISVILLE-JEFFERSON COUNTY METROPOLITAN SEWER DISTRICT
APPELLEE

OPINION
AFFIRMING

****

BEFORE: BUCKINGHAM, GIUDUGLI, and KNOPF, Judges.

BUCKINGHAM, JUDGE. Spanish Cove Sanitation, Inc., appeals from an order of the Jefferson Circuit Court dismissing its complaint for monetary damages and equitable relief against Louisville-Jefferson County Metropolitan Sewer District ("MSD"). Because applicable

case law does not allow Spanish Cove to recover monetary damages or otherwise be compensated, we affirm.

Spanish Cove is a private, for-profit corporation which owns a wastewater treatment facility including grounds, equipment, pipe systems, and appurtenances in southern Jefferson County, Kentucky. MSD is a municipal corporation empowered by Kentucky Revised Statutes (KRS) Chapter 76 with the right to maintain, operate, and make extensions and improvements to the comprehensive sewer and drainage system within its district. In the 1970's, MSD was designated the regional wastewater service provider for the area by the Natural Resources and Environmental Protection Cabinet ("the cabinet"), and MSD has the power of eminent domain pursuant to KRS 76.110(1).

At the time Spanish Cove filed this action in the circuit court, MSD was involved in constructing and extending a comprehensive sanitary sewer project in the area. This project was known as the Fern Creek Interceptor Number Five and was to extend from MSD's uppermost point at its Kellwood Wastewater Treatment Facility and terminate at its lowermost point, the Morris-Foreman Sewage Treatment Facility. Along this main line, MSD planned to extend another line and connect its main to the Spanish Cove system. Spanish Cove claimed that this attachment would flush all of its customers into MSD's Morris-Foreman system, amount to the taking of every pipe within the Spanish Cove system without compensation, and render its plant valueless.

Spanish Cove owns and operates a wastewater treatment plant in the vicinity of MSD'S Kellwood plant. In fact, the Kellwood service area is adjacent to the Spanish Cove service area. Due to the Fern Creek Interceptor Number Five construction plans, the topography of the area, and the need to maintain gravity flow in the sewer lines, MSD needed to obtain an easement across Spanish Cove property. After Spanish Cove refused to grant an easement, MSD filed a condemnation action in the circuit court. In May 1997, the circuit court ruled in favor of MSD and ordered Spanish

Cove to transfer an easement to MSD across the Spanish Cove property. That circuit court action preceded Spanish Cove's complaint which initiated-this suit.

In August 1997, Spanish Cove filed a complaint in the circuit court alleging that MSD "will attach to an existing pipeline system" and "will usurp the customers currently serviced by Plaintiff and interfere with its existing business operations." The complaint further alleged that MSD's project would render Spanish Cove property valueless, that it amounted to a taking of property without just compensation, and that Spanish Cove was entitled to equitable relief and damages as a result.

MSD moved the court to dismiss Spanish Cove's complaint or, alternatively, to grant it summary judgment, arguing that the action was not yet ripe for adjudication since no taking had occurred. MSD also argued that Spanish Cove was not entitled to compensation, as KRS 65.115 had been held to be unconstitutional in Monticello Co. v. Commonwealth, Ky. App., 864 S.W.2d 921 (1993).

In March 1998, the circuit court entered an order dismissing Spanish Cove's complaint with prejudice. The court gave no reason for its order other than that "the record reflects that the taken property has in fact been paid for"FN1. Although the video record of the hearing on MSD's motion to dismiss reveals that the trial judge appeared to believe that the case was not ripe for adjudication, the order made no mention of this as a reason for dismissal. Furthermore, if the court was of the opinion that the case was not ripe for adjudication, it did not explain why Spanish Cove's claim should nonetheless be dismissed "with prejudice." In addition, the order contained the following notation after the judge's signature: "Note: An appeal should be taken in this action in regard to the interpretation of KRS 446.090 vs. the interpretation of KRS 65.115. The issue of a lack of constitutional standing and the issue of special legislation should be decided by the appellate court." This appeal by Spanish Cove followed.

FN1 This portion of the order obviously refers to the Spanish Cove property that was taken in the prior condemnation action. Neither that action nor the fact that Spanish Cove was compensated for the condemned property has any relevance to our determination in this case.

Had KRS 65.115 not been held unconstitutional by this court's decision in Monticello, then MSD could have been compelled to pay compensation for the sewer line installations to Spanish Cove. KRS 65.115 provides in its entirety as follows:

> (1) The provisions of any other law, rule, or regulation notwithstanding, if any city, county, public body corporate or politic or special district or subdistrict, other than an urban county, furnishes, or proposes to furnish, sewage treatment utility services to, customers of another sewage treatment utility by means of all or any part of the installations owned or paid for by such other sewage treatment utility, then such, city, county, public body, district or subdistrict taking over or proposing to take over the customers, shall pay just compensation for such installations prior to the time the customers are taken over. If an agreement for compensation is not reached, then just compensation for the installations shall be payable by said city, county, public body, district or subdistrict after condemnation as provided for in the Eminent Domain Act of Kentucky.
>
> (2)There is hereby granted to any city, county, public body corporate or politic or special district or subdistrict, the power of eminent domain with respect to sewage treatment plants, facilities and installations owned by sewage treatment utilities. Such power of eminent domain shall be

exercisable in the manner prescribed by the Eminent Domain Act of Kentucky.

(3) Any city, county, public body corporate or politic or special district or subdistrict shall be entitled to surcharge customers so as to recover the amount of compensation paid for installations acquired under this section by agreement or condemnation.

See also Louisville & Jefferson County Metropolitan Sewer District v. Tarrytowne Sanitation Co., Ky. App., 818 S.W.2d 267 (1991).

Spanish Cove urges us to sever the unconstitutional portion of KRS 65.115 from the remainder of the statute and uphold its constitutionality. Because Monticello declared the entire statute unconstitutional as special legislation, Monticello 864 S.W.2d at 924, we may not do so without overruling Monticello. This panel would overrule Monticello and revive KRS 65.115 except for the portion of it that was unconstitutional as special legislation. However, a majority of the entire Court of Appeals, after considering this issue en banc, refused to do so. We are therefore bound by Monticello which declares the entire statute unconstitutional.

The basis of this court's decision in Monticello was that the statute was unconstitutional as special legislation because it excluded urban county governments from its scope. FN2 Although KRS 65.115(2) grants the power of eminent domain with respect to sewage treatment plants, facilities, and installations owned by sewage treatment facilities to any city, county, public body corporate or politic or special district or subdistrict, KRS 65.115(1) exempts urban counties from paying just compensation for the use of privately-owned installations prior to the time the customers are taken over as is required of all other public bodies. As the Monticello court held, this is special legislation in violation of Sections 59 and 60 of the Kentucky Constitution. FN3 Having properly determined that KRS 65.115 contained an unconstitutional portion which constituted special

legislation, the Monticello court did not take the next step and determine whether the unconstitutional portion of the statute could be severed, thereby leaving the remainder of the statute intact.

> FN2 Lexington-Fayette County Urban Government is the only such government in Kentucky.
> FN3 Section 59 provides, in pertinent part, that "(t)he General Assembly shall not pass local or special acts concerning any of the following subjects, or for any of the following purposes....: Twenty-ninth: In all other cases where a general law can be made applicable, no special law shall be enacted." Section 60 provides in part that "[t] he General Assembly shall not indirectly enact any special or local act...by exempting from the operation of a general act any city, town, district, or county..."

In the opinion of this panel, KRS 446.090 was clearly applicable. KRS 446.090 states:

> It shall be considered that it is the intent of the general assembly, in enacting any statute, that if any part of the statute be held unconstitutional, the remaining parts shall remain in force, unless the statute provides otherwise, or unless the remaining parts are so essentially and inseparably connected with and dependent upon the unconstitutional part that it is apparent that the general assembly would not have enacted the remaining parts without the part, or unless the parts, remaining standing alone, are incomplete and incapable of being executed in accordance with the intent of the general assembly.

As KRS 446.090 applies to KRS 65.115, we first note that

the latter statute does not provide that the entire statute should be determined to be unconstitutional if any portion of it is so declared. Next, we note that the five-word phrase "other than an urban county" is neither essential nor inseparably connected and dependent upon the constitutional portion such that the general assembly would not have enacted the statute without it. This very rationale was applied by this court to a statute regarding horse racing in Tri-City Turf Club. Inc., v. Public Protection & Regulation Cabinet, Ky. App., 806 S.W.2d 394, 397 (1991). This panel believes that this court's decision in Monticello was too broad in declaring KRS 65.115 unconstitutional in its entirety and that the statute should have been held to remain in force after severing the unconstitutional portion concerning urban county governments under the tenets of the Tri-City case and KRS 446.090. Again, however, we are bound by Monticello because a majority of the entire court has declined to overrnle it.

Because KRS 65.115 has been held unconstitutional and no longer mandates that compensation for sewer main installations paid in cases such as this, we must look to other applicable law to determine whether Spanish Cove may be compensated. In Calvert Investments, Inc. V. Louisville &Jefferson County Metropolitan Sewer District, 847 F.2d 304 (6th Cir. 1988), MSD was involved in a similar dispute with another private sewer system. In that case, Calvert, the private sewer system serving the area, claimed an unconstitutional taking of its property when the City of Minor Lane Heights ended its relationship with Calvert and granted MSD the right to tap into the twenty-one inch main and divert the sewage to its own treatment facilities. The Sixth Circuit acknowledged that Calvert had legal title to the sewer-mains, subject to the right of the lot owners to the free and unrestricted use of the mains. Id. at 307. The court stated that the right of free usage gave the lot owners the right to agree that the sewage would be delivered through the mains to MSD rather than to Calvert. Id.

In response to Calvert's argument that this

amounted to a taking without just compensation contrary to constitutional provisions, the court held that "[t]he property interest of Calvert in the sewer mains, as defined by Kentucky law, was not 'taken' by MSD's connection with the twenty-one inch main." Id. at 308. The court further held that Calvert's being deprived of the privilege of continuing to treat the lot owners' sewage for a profit was nothing more than a hope or expectation that was not a protected property interest under Kentucky law. Id. We conclude that the case sub judice is governed by the principles of Calvert rather than KRS 65.115 because that statute has been declared unconstitutional. In short, Spanish Cove had no cause of action against MSD because it was entitled to no compensation under Kentucky law. The trial court properly awarded summary judgment to MSD.

The judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

JEFFERSON CIRCUIT COURT

DIVISION ELEVEN

JUDGE KEN G. COREY

NO. 97 CI 04911

SPANISH COVE SANITATION, INC. PLAINTIFF

ORDER

LOUISVILLE-JEFFERSON COUNTY MSD DEFENDANT

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Oral arguments on the defendant's motion to dismiss or for summary judgement were held February 23, 1998. The record reflects that the taken property has in fact been paid for. A review of the pleadings and the arguments of counsel lead the Court to dismiss, with prejudice, the claims of Spanish Cove Sanitation, Inc. filed against the Louisville and Jefferson County Metropolitan Sewer District in this action.

This is a final and appealable order and there is no just cause for delay in its entry and/or execution.

/s/
KEN G. COREY, JUDGE

March 5, 1998
DATE

cc: John Michael Poole, Attorney
Laurence Zielke, Attorney

Note: An appeal should be taken in this action in regard to the interpretation of KRS 446.090 vs. the interpretation of KRS 65.115. The issue of a lack of constitutional

standing and the issue of special legislation should be decided by the appellate court.